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Nos. 17, 18, and 19

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court rendered no opinion, but filed conclusions of law (R. 1473–9) and detailed findings of fact (R. 1352–1473).

JURISDICTION

The judgment of the district court was entered on May 17, 1943 (R. 1480). Timely motions filed by the defendants to amend the findings of fact and conclusions of law on which this judgment was based were ruled upon on August 30, 1943.[1] The Government's petition for appeal in No. 17 was filed and allowed on July 16, 1943, and its petition for appeal in No. 18 was filed and allowed on October 27, 1943.[2] The petition for appeal in No. 19 was filed and allowed on October 29, 1943 (R. 1505, 1520).

The jurisdiction of this Court is invoked under Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. sec. 29, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. sec. 345. This Court on February 28, 1944, postponed further consideration of the question of its jurisdiction in these cases to the hearing of the cases on the merits (R. 1537).

QUESTIONS PRESENTED

1. Whether the appeal in No. 17 was premature and therefore ineffective and whether, if so, the

[1] R. 108, 118, 120, 122, 1485, 1489.

[2] R. 1495, 1496, 1499, 1500. The Government does not object to dismissal of its first appeal as premature if its second appeal is found to be timely (*infra*, pp. 26–33).

district court had jurisdiction to allow the appeal in No. 18.

2. Whether the provisions of the judgment relating to the acquisition of new theatres by the defendant exhibitors adequately prevent and restrain them from again violating the Sherman Act.

3. Whether the district court erred in prohibiting each of two individual defendants from exercising control over more than one defendant exhibitor and in prohibiting each defendant exhibitor from retaining or acquiring an interest in any other defendant exhibitor.

4. Whether the district court erred in enjoining the defendant exhibitors from combining with each other and with a major distributor in making franchise contracts which have the purpose and effect of maintaining the defendant exhibitors' monopolies and preventing competition with them.

5. Whether the district court erred in prohibiting the defendant exhibitors from using circuit buying power, in licensing films, to restrain competition between them and operators of independent theatres.

6. Whether the evidence adequately supports all essential allegations of the complaint.

7. Whether the admission of any incompetent evidence or the court's method of formulating its findings invalidates its findings or requires reversal of the judgment which it entered.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * (15 U. S. C. sec. 1.)
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * (15 U. S. C. sec. 2.)
>
> * * * * *
>
> SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U. S. C. sec. 4.)

STATEMENT

PRIOR PROCEEDINGS IN THE CASE

The United States brought this suit against nine affiliated companies (referred to as the defendant exhibitors) operating motion picture theatres in some 70 small towns (referred to as Crescent towns) in Alabama, Arkansas, Kentucky, Mississippi, and Tennessee; against four officers of these companies; and against the eight major distributors[3] of motion picture films, charging them with conspiring to restrain interstate commerce in motion picture films and to monopolize the exhibition of films in the area in which defendant exhibitors operate, in violation of Sections 1 and 2 of the Sherman Act. The principal allegations of the complaint are:

The defendant exhibitors have collectively contracted with each major distributor to obtain for themselves, in all Crescent towns, the right to priority of exhibition of all feature pictures selected by the defendant exhibitors. The priority rights thus obtained have enabled the defendant exhibitors to restrain and suppress competition by preventing other exhibitors from obtaining the first-class pictures required for successful theatre operation and by preventing competitors from

[3] In the case of three of these distributors (Paramount, Universal, and Warner), both the parent company and the subsidiary engaged in distributing its films were named as defendants (R. 3–5).

exhibiting feature pictures released by the major distributors except those which the defendant exhibitors had rejected or had previously exhibited. By these means competition in Crescent towns has been practically eliminated. Independent exhibitors have been induced to sell to the defendant exhibitors under the latters' threat to open competing theatres and to prevent independents from procuring desirable pictures. By such tactics a large number of independent exhibitors have been forced out of the motion picture business. (R. 8–10.)

After a consent decree had been entered against five of the major distributors in *United States* v. *Paramount Pictures, Inc.* (R. 198–226),[4] the United States dismissed the present suit against these five distributors and eliminated from the complaint paragraphs 50 to 53, inclusive, which charged the major distributors with conspiring with each other to impose certain restraints, but it did not eliminate the charge that each of them had conspired with the defendant exhibitors to restrain and to monopolize trade in Crescent towns (R. 7, 9, 19).

The case was tried in the summer of 1941 and orally argued in December 1941. On March 3, 1943, the court filed its findings of fact and con-

[4] This suit, pending in the federal district court in the southern district of New York, charged the major distributors with various violations of the Sherman Act (R. 177–197).

clusions of law (R. 1352–1479). The latter set forth that seven of the nine defendant exhibitors, three of the four individual defendants, and one major distributor, United Artists,[5] had violated the Sherman Act substantially as charged in the complaint (R. 1476–7). Final judgment giving effect to the court's conclusions was entered on May 17, 1943 (R. 1480–4). The judgment prohibits the various acts and practices which the court had held to be illegal; requires each defendant exhibitor to divest itself within a year of any interest in any other such defendant (except Strand Enterprises, Inc.); prohibits the defendants Sudekum and Stengel from controlling or acting as an officer of more than one defendant exhibitor; and prohibits the defendant exhibitors from acquiring any new theatre (outside of Nashville) in any town where there already is a theatre unless the owner makes a voluntary offer of sale and no exhibitor defendant has coerced or has attempted to coerce such sale by predatory practices.

Several motions to amend the findings and conclusions, filed by the defendants within 10 days of entry of judgment, were ruled upon on August 30, 1943 (R. 108–139, 1489–95). On that date the court amended certain findings and conclusions in

[5] The court found that the evidence did not establish a violation of the Sherman Act by Columbia or Universal, the two other major distributors remaining as defendants, and that the complaint should be dismissed as to them (R. 1457–64, 1474–5).

respects not material here but made no change in its judgment. Conclusion of law No. 20 was amended so as to accord with the relief against new theatre acquisitions granted by the judgment, which relief was narrower than that set forth in the court's original conclusion No. 20 (R. 1479, 1484).

In Nos. 17 and 18 the Government has specified as error the court's refusal to enter an injunction against future theatre acquisitions in accordance with the court's original conclusion of law No. 20 (R. 1497–9).

In No. 19 the defendants* have specified as error the injunction against acting in combination in making franchise contracts for films for the purpose of injuring competitors or maintaining a monopoly; against combining closed towns with competitive situations in licensing films, for a like purpose; and against conditioning the licensing of films in a competitive situation upon the licensing of films in other situations (R. 1518). They also attack the provisions of the judgment which require divestiture of stock in affiliated corporations and which permit the defendants Sudekum and Saengel to control and to act as an officer of only one defendant exhibitor (R. 1519). Certain portions of the court's findings and certain rulings on evidence are also assigned as error (R. 1506–17).

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* United Artists, Muscle Shoals Theatres, and Louis Rosenbaum have not joined in the appeal.

THE FACTS AND ISSUES NOT NOW IN DISPUTE

The court's findings are largely undisputed. Of 187 findings, the defendants have assigned specific error to only particular sentences or paragraphs in 16 findings (R. 1506–14).[1] The Government submits that there is adequate supporting evidence for all of the findings to which specific error is assigned, and a brief statement of such evidence is set forth in Appendix A, *infra*, pp. 74–77. Moreover, the disputed findings merely furnish additional illustrations of practices which are fully established by other findings.

The district court's findings are so comprehensive and detailed and are so largely undisputed that the Government believes that it will not be necessary for this Court to examine the portions of the evidence which have been included in the record on appeal. For the convenience of the Court, a table of contents of the findings, with record citations, is given in Appendix B, *infra*, pp. 78–79. All record citations in this brief refer, unless otherwise indicated, to the district court's findings.

The conclusions of law and the provisions of the judgment based thereon which have not been as-

[1] The defendants have also generally assigned error to all findings and parts of findings which follow the language of the brief which the Government submitted to the court (R. 1514; see R. 1522) and to such findings and parts of findings as are "predicated upon" unsworn statements made by employees of distributors and other "third persons" (R. 1515).

signed as error establish the following violations of the Sherman Act: The defendant exhibitors have agreed to divide the territory in which each may operate (C. 11, J. 2[1]) and have combined to suppress competition therein (C. 12, J. 3); they have combined in licensing films from major distributors for the purpose of maintaining their respective monopolies and preventing competition (C. 13, J. 4); they have maintained unreasonable monopolies in the towns in which each operates (C. 9A, J. 7); and they have eliminated actual and potential competition by predatory practices (C. 9C, J. 9) (R. 1476–7, 1480–2).

Defendants likewise do not question the application of the Sherman Act to the business of exhibiting motion pictures as it is carried on by the defendants (cf. *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208) and the court's findings show that this business involves a regular interchange of films in interstate commerce. Prior to the beginning of the motion picture season representatives of each major distributor solicit from exhibitors contracts for the distributor's feature pictures for the coming season, these contracts being subject to approval or rejection by the home office in New York. The films covered by a contract are forwarded from New York, New Jersey,

[1] "C. 11" refers to conclusion of law No. 11 and "J. 2" refers to paragraph 2 of the judgment. Like abbreviations are used in the further references in the above paragraph.

or California to the distributor's exchanges serving the area.[9] The exchanges deliver the films to the exhibitor and after exhibition he ordinarily returns the film to the exchange from which it came. About 90% of the film rentals paid by the defendant exhibitors is paid to the major distributors. (R. 1356–7.)

THE DEFENDANT EXHIBITORS—THEIR AFFILIATION AND MONOPOLY POSITION

Crescent, the principal defendant exhibitor, owns 50% of the capital stock of Cumberland and Lyric (R. 1359).[10] The majority of Crescent's stock is owned by the defendant Sudekum, his wife, his brother, and his two sons-in-law, the defendants Stengel and Baulch (R. 1358). Crescent also owned 62½% of the stock of Muscle Shoals from its organization in 1924 to 1937, since which time the business has been conducted as a partnership in which Sudekum's wife has a half interest (R. 1359). Stengel is the record holder of all the

[9] These exchanges are located at Atlanta, Cincinnati, Indianapolis, Memphis, New Orleans, and St. Louis (R. 1353–6). All except the Memphis exchange are thus in a State other than those of the Crescent towns.

[10] The following abbreviated titles are used herein: Crescent for Crescent Amusement Co.; Cumberland for Cumberland Amusement Co.; Lyric for Lyric Amusement Co., Inc.; Cherokee for Cherokee Amusements, Inc.; Kentucky for Kentucky Amusement Co., Inc.; Muscle Shoals for Muscle Shoals Theatres; and Rockwood for Rockwood Amusement Co.

stock of Rockwood and Rockwood owns 50% of the stock of Cherokee and Kentucky and of five other theatre corporations (R. 1361). Rockwood has operated as a virtual branch of the Crescent business under the immediate supervision of Stengel (R. 1371).[11]

As admitted by the defendants' answer, Sudekum is president of Crescent, Cumberland, and Lyric and Stengel is an officer and a director of Kentucky and Cherokee (R. 3, 14). Sudekum is paid $10,400 a year by Cherokee for his "advice" (R. 1364).

On August 11, 1939, the date the complaint was filed, the defendant exhibitors and their affiliates were operating theatres in 78 towns and had competition in only five.[12] This represented over 100% expansion in five years' time; on August 11, 1934, they had been operating in 32 towns, in six of which there was competition. They are

[11] Rockwood's executive offices have been in the same building as those of Crescent, being first donated by and later leased by the latter. Sudekum gave to Stengel the equipment of one of the two theatres with which Rockwood started in business and gave him the half interests in two theatre corporations which Rockwood now owns. Individual theatres have been transferred from Crescent subsidiaries to Rockwood. (R. 1371.)

[12] The figures given in this paragraph do not include Nashville. The conspiracy in which the defendants were engaged did not embrace Nashville due to the different situation existing there, where certain major distributors were operating theatres.

operating in all but nine of the 45 towns in Tennessee having a population between 2,500 and 10,000. (R. 1362–3.) On August 11, 1939, Crescent alone was operating 49 theatres, Cumberland 13, Rockwood 12, and companies in which Rockwood had a half interest, 25 (R. 1358, 1360–2). Five years earlier Crescent had been operating 29 theatres and Cumberland seven; the operations of Rockwood and its affiliates at the earlier date are not stated (*ibid.*).

During the five-year period prior to suit Crescent's growth in earnings and surplus was out of all proportion to the increase in its gross receipts and assets. Comparing the fiscal year ended June 30, 1939, with that ended June 30, 1934, Crescent's total assets and gross receipts less than doubled but its surplus increased 30 times and its net earnings[13] more than five times. During the entire period its annual net earnings averaged about 35% on its capitalization. (R. 1429–30.) Rockwood, which was organized in 1936, experienced a like phenomenal growth in earnings and surplus. Comparing the calendar year 1939 with the calendar year 1937, Rockwood's total assets and gross receipts approximately tripled, but its surplus increased about eight times and its net earnings 31 times. During the three-year period

[13] The net earnings referred to in this paragraph mean net earnings exclusive of dividends received.

its annual net earnings averaged about 12 times its original capital investment. (R. 1429–30.)[14]

ELIMINATION OF COMPETITION THROUGH USE OF CIRCUIT BUYING POWER

The facts previously recited show the opportunity possessed by the defendant exhibitors to exercise "circuit buying power" and to earn monopoly profits. Use of this power means that the operator of a chain of theatres negotiates exhibition contracts for a particular theatre in one area on the basis of the buying power of his other theatres in other areas. Such power is primarily measured, not by the number of theatres involved, but by the proportion between those where there is no competing theatre, i. e., closed towns, and those which are faced with opposition. Thus if a circuit controls 10 closed towns and one theatre in a town where there is competition the distributor may be denied access to any of the closed towns unless it satisfies the demands of the circuit in the competitive situation.[15] Where, as in this

[14] A supplementary finding, made at defendants' request, states that popcorn sales and screen advertising accounted for a "large part" of Rockwood's profits (R. 1493). But the revenue from screen advertising appears to be directly attributable to Rockwood's monopoly position in all the towns in which it operated (R. 1361). This obvious source of revenue would not have been generally neglected by exhibitors had they not found that under competitive conditions this practice adversely affected patronage.

[15] As an illustration of this, see the report of a United Artists salesman explaining the failure to continue licensing

case, the circuit's policy is to absorb competitors, the demands will include restricting the independent's ability to license films to the extent necessary to prevent him from offering effective competition. As competition is thus eliminated circuit buying power progressively expands.

Not only were Crescent and Rockwood able independently to exercise circuit buying power, but the defendant exhibitors frequently acted together in making license agreements (R. 1368–71). Because of their close association in ownership and management, the weight of the buying power of the entire group could be brought to bear at any desired point.

In numerous instances competitors were eliminated after the defendant exhibitors had, through their circuit buying power, succeeded in limiting the supply of films of the major distributors available to the independent for first-run and for second-run showing. This occurred both in cases where a circuit theatre was opened in opposition to an established independent theatre and in cases where the independent opened in oppposition to an

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its pictures to a theatre in Rogersville, Tennessee, after one of the defendant exhibitors, Cumberland, had opened a theatre there (R. 1384): "In Rogersville Hill [of Cumberland] has opened a new theatre and we will have to play with Hill because this is the only spot of his entire fifteen towns where there is any opposition at all; and Hill has demanded that we approve all contracts or none."

existing circuit theatre.[16] Upon purchase, the independent theatre was closed.[17] As part of the terms of acquisition, the independent exhibitor was usually required to enter into an agreement not to engage in the motion-picture business for periods ranging from 5 to 25 years (R. 1365–8). In some cases the area covered by such agreement was much larger than that served by the acquired theatre and was substantially coextensive with the area of the defendant exhibitors' operations; in other cases the agreement applied to a more limited area (*ibid.*). The court found that these agreements demonstrated the defendant exhibitors' "clear intention to monopolize theatre operation" (R. 1367).

In certain instances the former independent was, in effect, made a junior partner in circuit operations. This happened when the independent theatre or theatres were transferred to a new corporation with half the stock going to a defendant exhibitor and the other half to the prior owner. Cumberland, Cherokee, and Lyric were formed in this way. (R. 1363–4.)

The ordinary film-licensing agreement covers a

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[16] Examples of the former situation are Brownsville (R. 1372–8), Earlington (R. 1379–83), Rogersville (R. 1383–8), McKenzie (R. 1388–9). Examples of the latter are Paris (R. 1373–8), Hopkinsville (R. 1391–4), Athens (R. 1399–1402), Union City (R. 1403–12).

[17] R. 1378, 1383, 1388, 1394, 1402, 1412.

single season's product, but the defendant exhibitors jointly entered into long-term franchise contracts with certain major distributors which conferred upon them, for the duration of the respective franchises, important exclusive film-licensing privileges (R. 1430).[18] By these franchises the defendant exhibitors were given the right to first-run exhibition of all feature pictures which they chose to select in substantially all of their towns.[19] Clearances establishing the time lag prior to subsequent exhibition in the same or nearby towns were fixed.[20] The opportunity of competitors to obtain feature pictures for exhibition following runs in defendants' theatres was further restricted by repeat provisions which gave defendant exhib-

[18] The Paramount franchise ran for five years (R. 1431). Warner franchises have been in effect for 13 years by virtue of a two-year franchise, extended first for five years and then for two years, followed by a four-year franchise (R. 1439–40). Fox has entered into two successive three-year franchises (R. 1451, 1453).

Not all the defendant exhibitors were parties to all franchise contracts. The Paramount franchise, embodied in substantially identical contracts, covers the theatres of Crescent, Lyric, Rockwood, and Rockwood's subsidiaries (R. 1430, 1437). The latest Warner franchise is in the form of separate contracts for each town and covers Crescent, Lyric, Muscle Shoals, Rockwood, Kentucky, and Cherokee towns (R. 1439–40). The latest Fox franchise covers all Crescent, Lyric, Muscle Shoals, and Rockwood towns (R. 1453).

[19] R. 1431, 1439, 1440, 1443–4, 1451, 1452, 1453.

[20] R. 1432–4, 1446–7, 1452, 1456.

itors the option of showing a picture in their theatres a second time.[21]

The Paramount franchise was contrary to the company's general policy (R. 1438). The deal was made because the Sudekum circuit had virtually eliminated competition in its area and the contract was a way of getting back into the circuit after Sudekum had refused, following a dispute with Paramount over operation of its theatre in Nashville, to license its product for four of the five preceding seasons (R. 1431, 1438). The first Fox franchise likewise followed a season during which Fox had been unable to sell to the Sudekum circuit, and Fox entered into the franchise because it would receive a substantially larger return thereunder than that obtained from independents in the same area although in the particular towns in which the independents operated they paid higher rentals than the Sudekum theatres (R. 1448–9, 1451–2). The Warner franchise was tied to the elimination of potential theatre competition between Crescent and Warner in Nashville (R. 1439).

Keeping or threatening to keep a distributor's product out of a circuit's closed towns unless its demands as to competitive towns are met operates

[21] R. 1432, 1441, 1442, 1446, 1451–2, 1453–4. Under the Paramount franchise the repeat showing could be as much as 120 days after the first showing (R. 1437). Competitors would be excluded from showing the picture during the period of the repeat-run option (R. 1437–8).

to eliminate all competition in licensing films in the latter situation. The result is that, because of wholly extraneous factors, the independent theatre is denied opportunity to obtain films on a competitive basis. This is illustrated by the following letter from Paramount's eastern sales manager to the manager of its Indianapolis exchange explaining why Paramount gave the Crescent theatre in Madisonville clearance for the 1935–6 season over the independent theatre in the adjacent town of Earlington which previously had received clearance over Madisonville (R. 1381):

> If Madisonville were the only town involved in the Sudekum deal I agree with you that they would not be entitled to any protection over Earlington. However that is not the case. We have finally been successful in closing a deal with the Sudekum Circuit, which we have been unable to sell for a number of years * * *: but since there is much more involved than just Madisonville, the Company is desirous of securing the film rental we have not had for several years from the Sudekum towns, and it was necessary to include in the Madisonville deal the Earlington protection.

Another example is Loew's refusal to license its 1935–6 product to an independent in Brownsville who had been using its product "ever since he has been in business and paid excellent rentals," after a Crescent theatre had been opened there (R.

1374–8). Sale of the independent theatre to Crescent followed shortly, in April 1936 (R. 1378). What happened is briefly stated in a letter from the manager of Loew's Memphis exchange to its southern district manager (*ibid.*):

> I know Mr. Lawing [the independent] personally and know this is the party Mr. Sudekum sat down on top of in Brownsville, Tennessee, and finally ran him out of town. Mr. Lawing is a very good theatre operator, but cannot buck such opposition as Sudekum.

SPECIFICATION OF ERROR TO BE URGED IN NOS. 17 AND 18

The district court erred in entering paragraph (19) of the judgment and in failing to enjoin the defendant exhibitors from acquiring an interest in any additional theatre outside of Nashville, Tennessee, except after affirmatively showing to the court that the acquisition will not unreasonably restrain competition.

SUMMARY OF ARGUMENT

I

The Government is inclined to believe that the motions to amend the district court's findings which were pending when the court allowed the Government's first appeal from the judgment rendered that appeal (No. 17) premature. But if this is so, this Court has jurisdiction of the Government's second appeal (No. 18), which the dis-

trict court allowed after its judgment had become final. The allowance of an invalid appeal does not deprive a court of all further jurisdiction in the cause. Allowance of an abortive, premature appeal does not deprive the court of power to allow a second appeal after its judgment has ripened into finality. *Ohio Public Service Co.* v. *Fritz*, 274 U. S. 12.

II

In view of the defendants' use of circuit buying power to eliminate competition, the extent to which they in fact eliminated competition, and the court's conclusion that the defendant exhibitors were maintaining unlawful monopolies in the areas in which they respectively operated, dissolution of the defendant exhibitors would have been an appropriate remedy. The minimum appropriate relief was to prohibit further expansion unless the legality of any proposed acquisition was first affirmatively shown. The district court originally concluded that the plaintiff was entitled to such relief. However, in the hearing on the judgment to be entered the court expressed reluctance to assume the burden of passing upon the legality of theatre acquisitions and the judgment which was entered merely prohibits acquisitions which are the product of "predatory practices" by the defendants.

We submit that in this respect the judgment

fails to grant adequate relief and is otherwise open to serious objection. It sanctions, by implication, acquisitions not involving predatory practices but within other prohibitions of the judgment. The prohibition, being framed in terms of trade practices rather than being specific, means that a contempt proceeding for violation involves the delays and difficulties of an original proceeding to enforce the statute. For these and other reasons the possibility of a fine for contempt is not an effective deterrent. And even if a fine is ultimately imposed this does not restore the competition previously eliminated or make the acquired theatre once again competitive. It does not carry out the purpose of equity proceedings under the Sherman Act—to prevent and restrain future violations of the statute.

III

The various defendant exhibitors, each operating a theatre chain, are affiliated and under common control. They have agreed upon a division of areas of operation, have obtained preferences over competitors by combined use of circuit buying power, and have otherwise acted in unison. As long as the inducement to combined action, by reason of common ownership and control, continues, the general injunctive provisions of the judgment against certain practices will not effectively open up and keep open the door to fair competitive opportunity in the area in which the

defendant exhibitors operate. The defendants make the argument that the required divestiture is not in the public interest because it would weaken their bargaining power in dealings with distributors. But it is, and must be assumed to be, in the public interest to prevent the stifling of competition and monopolization as to exhibiting motion pictures which the record reveals. Defendants' argument further ignores the fact that each defendant exhibitor will have, notwithstanding divestiture, greater resources than its competitors, and other bargaining advantages over them.

IV

The judgment enjoins the defendant exhibitors from combining with each other and with a major distributor in making franchise contracts for the purpose of maintaining their present theatre monopolies and preventing competition. The franchises being one of the principal means employed in effectuating the general scheme to monopolize and restrain trade, the prohibition against use of such means was properly phrased in terms of purpose and effect. The facts would have warranted outright prohibition of this means. The defendants have no ground for complaining of the indefiniteness of the prohibition since it is the provisions alleged to be unduly indefinite which narrow the scope of the prohibition to the defendants' advantage.

V

The judgment prohibits the defendant exhibitors from using circuit buying power to restrain competition in the licensing of films. When one of two exhibitors in a town operates theatres in other towns in which he has no competition and threatens not to license a distributor's pictures in his closed towns unless he is given the first-run showing and other preferences in the competitive town, irrespective of the equal or better terms offered by the competitor, such practices, when successfully pursued, eliminate competition between the two exhibitors in the licensing of the distributor's pictures. The court's prohibition of these practices is not to be condemned because the judgment does not in terms prohibit distributors from using reverse leverage against the defendant exhibitors.

VI

The defendants contend that the Government failed to prove the allegations of the complaint as amplified by the bills of particulars. This issue is not within defendants' assignment of errors and it was not raised below. The supporting argument ignores the fact that findings made by the court which the defendants have not questioned as lacking in evidentiary support demonstrate that there was ample proof of all essential allegations of the complaint. We submit that the defendants have erroneously interpreted the com-

plaint and have misconstrued the effect and scope (as applied to the complaint) of the bills of particulars filed by the Government.

VII

A. The receipt in evidence of the inter-office communications between officers or employees of major distributors does not constitute ground for reversal. These communications were supplementary proof of facts found by the court which were adequately supported by other evidence. The court's evidentiary ruling, if error, was therefore harmless error. The defendants were not denied opportunity to cross-examine as to the truth of the statements in these communications. In addition, the communications were properly received in evidence under the principle that the acts or declarations of a co-conspirator are admissible against his fellow conspirators. The distributors were charged with being, and, except for two, were shown to be, co-conspirators with the defendants who have appealed.

B. The action of the district court in formulating many of its findings in language corresponding to that in the Government's brief does not deprive the findings of the usual presumption of correctness. The court's consideration of the case was painstaking and judicious and the comparatively minor amendments to the findings requested by the defendants attest their substantial accuracy.

ARGUMENT

I

THIS COURT HAS JURISDICTION EITHER OF THE APPEAL IN NO. 17 OR OF THAT IN NO. 18

The district court entered final judgment in this case on May 17, 1943 (R. 1480). On the sixtieth day after judgment the Government, being in doubt as to whether certain pending motions to amend the court's findings operated to extend the time for appeal, applied for and was allowed an appeal (No. 17) from the court's judgment (R. 1495, 1499). The appellees have moved to dismiss this appeal upon the ground that it was premature.

The district court ruled on the motions to amend its findings on August 30, 1943 (R. 1489). Within 60 days from this ruling both the Government and certain defendants applied for and were allowed appeals from the judgment entered on May 17, 1943, these appeals being, respectively, Nos. 18 and 19 (R. 1496, 1500, 1505, 1520). Appellees in No. 18 filed a statement opposing the jurisdiction of this Court upon the ground that the district court, by allowing the Government's first appeal and issuing citation thereon, lost jurisdiction of the cause and was without power to allow a further appeal. The jurisdictional statement filed in support of No. 19 suggests that if the district court lost jurisdiction of the cause by allowing the Government's first appeal,

it may have been without power to rule thereafter on the pending motions to amend the findings, in which event the appeal in No. 19 would be premature.

The position of the Government is that if its appeal in No. 17 was premature, the conclusion that that appeal is a nullity removes all doubt as to the validity of its appeal in No. 18. While the Government is now inclined to believe that the appeal in No. 17 was premature, the facts and considerations which appear to us to be pertinent will be briefly set forth.

NO. 17

Where a timely motion to amend the trial court's findings raises "questions of substance" so that the granting of the motion would necessarily alter "rights already adjudicated" the time for appeal runs from the order disposing of the motion. *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203. The Court in that case said (p. 206) that a motion which seeks to amend findings "in more than purely formal or mechanical aspects" tolls the appeals statute. The decision does not definitely indicate what test is to be applied in determining whether the requested amendments affect the substance of the judgment. Conceivably the test might be whether the issues raised by the motion have any substantial merit. If this is the test the Government doubts that the motions to amend which were pending when the appeal in

No. 17 was taken raised "questions of substance." Probably, however, the question of substance is to be determined by examining the scope of the issues which the motion raises on its face. Cf. *Zimmern v. United States,* 298 U. S. 167. If this is the proper test, the appeal in No. 17 was undoubtedly premature.

On the tenth day after judgment (within the time allowed by Rule 52 (b) of the Rules of Civil Procedure) various defendants filed a motion to amend the court's findings (R. 1485).[22] The motion states that each defendant "adopts and relies upon" the amendments to findings requested in (1) a motion to amend the findings filed on the same day by Crescent and (2) certain petitions to amend the findings filed in March 1943 by Rockwood, Cherokee, Kentucky, and Cumberland.

The Crescent motion which was thus adopted requested (1) specified changes in parts of 12 of the court's 187 findings, (2) elimination of all findings and parts of findings described as "adopted from" the Government's brief, and (3) elimination of all findings and parts thereof "predicated upon" unsworn statements made by employees of distributors and other "third persons" (R. 122–139). The Government doubts whether these requests raised any question of substance affecting the judgment. As to the first, the find-

[22] The motion also prayed that the court's conclusions of law and judgment be amended "consistently with" the amendments to the findings therein sought.

ings in which change was sought were merely supplementary to other findings which fully established every element of law violation encompassed by the judgment. As to the second, the fact that findings were couched in the language of the Government's brief clearly does not destroy their validity (*infra*, pp. 71–73). The objection to such of the findings as were predicated upon allegedly inadmissible evidence probably fails because of insufficient specification and certainly does not show that the findings to which it relates were material to the judgment.

The prior petitions filed by Rockwood, Cherokee, Kentucky, and Cumberland, which the motion to amend adopted, requested changes in the court's findings which, if granted, would have required that the complaint be dismissed as to these four companies (R. 108–121). Possibly the action of the court in later entering judgment against these companies is to be construed as a rejection of all parts of their pending petitions which were inconsistent with the court's judgment and, if this is so, there is a question whether requested changes in findings, upon which the court has already ruled adversely, raise questions of substance respecting the judgment.

NO. 18

If the appeal in No. 17, because premature, does not confer jurisdiction upon this Court it plainly did not oust the district court from jurisdiction

over the cause. An appeal cannot be at one and the same time a nullity in the appellate court but binding upon the court from which the appeal was taken.

Ohio Public Service Co. v. *Fritz*, 274 U. S. 12, squarely upholds the power of a court to allow a second appeal notwithstanding its earlier allowance of a premature appeal, which had not been dismissed or vacated, from the same judgment. The Ohio Supreme Court entered final judgment in June 1925. While an application for rehearing was pending, the court allowed a writ of error to this Court and issued citation and a supersedeas bond was filed.[23] After the court had denied the application for rehearing, it allowed a second writ of error. The case came before this Court on both writs and the defendant in error contended in its brief (pp. 10–11) that the first writ must have been abandoned when application was made for a second, and that the latter came too late because more than 90 days after entry of judgment. This Court briefly disposed of the jurisdictional question by saying (pp. 12–13):

> These two writs of error were sued out at different stages of the same cause; the first while a timely application for rehearing was pending; the second after this had been denied. Under the circumstances, plaintiff in error may rely upon the latter writ and No. 210 will be dismissed.

[23] Record in No. 210, October Term, 1926, pp. 1, 4, 12, 13.

When a party is uncertain whether appeal from a final judgment of a district court lies to this Court or to the circuit court of appeals, he may be allowed an appeal to both courts, and the appeal to the circuit court of appeals is valid if this Court does not have jurisdiction of the appeal taken to it. *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 582; *Columbia Gas & Electric Corp.* v. *American Fuel & Power Co.,* No. 814, October Term, 1943, decided May 22, 1944. Since in these cases one of the appeals necessarily preceded the other, the decisions mean that a court, when it allows an appeal, does not lose power to allow the same party a second appeal. While there cannot be appellate jurisdiction under both appeals, determination of the absence of jurisdiction under one establishes the appellate jurisdiction under the other.

Allowance of appeal does not deprive a court of further jurisdiction in the cause if the appeal was not authorized by statute, and a court which has improvidently allowed such an appeal may vacate its order of allowance (*Benitez* v. *Bank of Nova Scotia,* 109 F. (2d) 743, 747 (C. C. A. 1)).[24] The power to vacate implies the power to act, as

[24] An appeal before judgment which has become final is as much outside the authority of the appeals statute as an appeal taken, as in the *Benitez* case, after time for appeal has expired.

The court in the *Benitez* case dismissed two appeals but rendered decision on a third appeal taken from another order of the district court. This was the decision reversed in 313 U. S. 270.

in the instant case, upon the assumption of the nullity of the earlier order of allowance.

Even assuming *arguendo* that a court which had allowed a premature appeal would be deprived of jurisdiction in the cause until prematurity had been judicially determined; this would be the effect only where the premature appeal had been docketed with the appellate court. Filing the record with the appellate court is an essential step in perfecting an appeal. *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135, 137; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 35. In the instant case the record called for by the appeal in No. 17 had not been filed with this Court at the time the district court allowed the appeal in No. 18.[25]

Appellees in their statement opposing jurisdiction cited *Draper* v. *Davis*, 102 U. S. 370, and *Ensminger* v. *Powers*, 108 U. S. 292, 302–303, as holding that a court has no power to proceed in a cause while an appeal from its judgment is pending. But in each of these cases the pending appeal was concededly valid. The cases therefore have no application to the issue being presently considered, namely, the effect on the jurisdiction of the district court of allowance of an appeal which

[25] The time for filing the record in this Court pursuant to the appeal taken in No. 17 had been duly extended by orders of the district court (R. 1502). The record in all three appeals (Nos. 17, 18, 19) was ultimately filed in this Court on February 1, 1944.

was ineffective to vest jurisdiction in the appellate court. *In re McLean Store Fixtures Corp.*, 70 F. (2d) 217, 219–220 (C. C. A. 1), which appellees also cited, is even more remote from the issue. The court there held that it was without jurisdiction to entertain a motion for rehearing which had been filed not only after an appeal had been taken from its judgment but also after the time allowed for taking an appeal had expired.

II

THE DISTRICT COURT ERRONEOUSLY FAILED TO IMPOSE AS A CONDITION ON THE ACQUISITION BY A DEFENDANT EXHIBITOR OF ANY NEW THEATRE THAT IT FIRST AFFIRMATIVELY JUSTIFY THE ACQUISITION

The purpose of an equity suit by the Government under Section 4 of the Sherman Act is not punishment for past offenses but, in the words of that section, "to prevent and restrain" future violations of the act. The rule is well established that in such proceedings the Government is entitled to effective relief and that the court is "bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *Local 167* v. *United States*, 291 U. S. 293, 299. And in determining whether effective relief has been granted, serious consideration must be given to the question whether the judgment is so framed

that its prohibitions will, in actual practice, be enforced and applied. This Court's statement with reference to substantive violations of the statute that "Realities must dominate the judgment" (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360) is, we submit, equally applicable to the question of relief.

The district court found that the defendants had, within a six-year period, eliminated competitors in 20 towns [26] and potential competition in two other towns,[27] and that in several other towns they had made various threats, sometimes supplemented by film licensing discriminations, in an attempt to induce the sale to them of independent theatres.[28] It also concluded that each of five defendant exhibitors was maintaining an unreasonable monopoly of the exhibition business in the area in which it operated (R. 1476). Under these circumstances, dissolution or partial dissolution of these exhibitors would have been an appropriate remedy. Cf. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. Or the lower

[26] Huntsville, Fayetteville, Union City, Greenville (Tennessee), Maryville, Newport, Gadsden, Brownsville, Paris, Hopkinsville, Earlington, Rogersville, McKenzie, Spruce Pine, Morristown, Harriman, Athens, Copperhill, Greenville (Kentucky), Central City (R. 1363–4, 1366–7, 1387–8, 1390, 1395, 1402, 1425–6).

[27] Hickman, Decatur (R. 1428).

[28] Gallatin, Mount Pleasant, Scottsville, Russelville, Jefferson City, Lexington, Livingston (R. 1412, 1419–20, 1426–7).

court, in view of the "dangerous probability" that the exhibitors would continue their illegal expansion policy, might have prohibited all new theatre acquisitions.[29]

Instead of these more drastic curbs, the Government in the brief submitted at the close of the trial merely requested that any new acquisition be prohibited unless the defendant exhibitor first made an affirmative showing as to its legality. The district court in the conclusions of law which it filed in March 1943 adjudged that this relief was appropriate and necessary. Conclusion No. 20 (R. 1479) sets forth that the United States is entitled to a decree—

> restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, except after an affirmative showing that such acquisition will not unreasonably restrain competition.

The judgment subsequently entered did not, however, embody this relief. As shown by the hearing on the proposed judgment, the court was reluctant to assume the burden of ruling upon the

[29] The complaint in the *Paramount* case prayed that the theatre-owning distributors be required to divest themselves of either their theatres or their production and distribution facilities and prayed that a preliminary injunction issue restraining them from making any theatre acquisitions pending entry of final decree (R. 195–7). Such relief was not granted by the consent decree entered in November 1940 but it is requested in an application for modification of the decree filed by the United States on August 7, 1944.

validity of all new theatre acquisitions (R. 54, 94, 96). All that the judgment provides (par. 19, R. 1484) is that no defendant exhibitor shall acquire a financial interest in any additional theatre outside Nashville in any town where there already is a theatre—

> unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.[20]

The Government submits that the above relief is inadequate and defective (1) because the substantive prohibition is far too narrow and limited and (2) because from a practical, procedural standpoint the scales are weighted, not against those who have been found to have violated the law, but against the Government, with the result that even the limited prohibition imposed cannot be effectively enforced.

As to the substantive prohibition, only two conditions are imposed on further expansion of the defendants' theatre chains. One is that the owner "voluntarily offer" to sell his theatre. This condition, if it means that the independent

[20] Paragraph 9 enjoins each defendant exhibitor from coercing or attempting to coerce independent theatre operators to sell to it, by predatory practices (R. 1482).

must be the party who initiated the negotiations leading to sale, has no practical significance since the chain is known to be always a prospective purchaser. If "voluntarily" means that the sale must not have been induced by any restraint prohibited by the judgment, the limitation duplicates, without in any way fortifying, other provisions of the judgment.

The second limitation on acquisitions, that the purchasing defendants should not have been guilty of "predatory practices," appears to sanction all new acquisitions except those tainted with this one type of illegal restraint. By implication at least, acquisitions induced by any other type of restraint are permissible. If this is its effect, the condition narrows and largely destroys, so far as acquisitions are concerned, the general prohibitions of the judgment, including the prohibition (par. 7, R. 1482) against "creating or maintaining an unreasonable monopoly of the business of operating theatres." We submit that paragraph 19 impairs the effectiveness of other provisions of the judgment and that, unless modified, it should be stricken.

From the standpoint of procedure, the deficiencies of paragraph 19 are even more serious. Since the defendants have been adjudged guilty of illegally monopolizing the business of exhibition, the judgment clearly should impose upon them

the burden of showing that any new theatre acquisition meets the requirements of the judgment. Instead of this, paragraph 19 places upon the Government the burden of establishing beyond a reasonable doubt that the acquisition is barred by the judgment.[a]

We submit that limitations imposed on new acquisitions enforceable only by contempt proceedings long after the event fail to achieve the declared purpose of equity proceedings under the Sherman Act—to prevent and restrain violations of the statute. The acquisition of a competing theatre immediately terminates its competition. Punishment for contempt on account of an improper acquisition (in practical actuality, a money fine) does not restore the competition eliminated up to the time of the fine and cannot make the acquired theatre again competitive.

Prohibitions in which purpose or effect is an element or which are directed against trade practices necessarily described in general terms have the weakness that a contempt proceeding for their violation is, in substance, a proceeding to enforce the Sherman Act itself and therefore subject to the delays and uncertainties of such an action. As illustrative of this, see the cases referred to be-

[a] The Government can enforce the judgment only by bringing a contempt proceeding. Since such a proceeding is criminal (*United States* v. *Goldman*, 277 U. S. 229), the Government would have to show beyond a reasonable doubt that the judgment had been violated.

low.[32] What may be termed the trade practices of the defendants which the court found illegal could be dealt with only by this type of prohibition; but in the case of theatre acquisitions it is entirely feasible to impose an absolute bar, to be lifted upon a showing as to the legality of any proposed acquisition.

Not only is the efficacy of the relief given by paragraph 19 subject to the usual weaknesses attaching to prohibitions framed in general terms, but there are special considerations strongly indicating the probable ineffectiveness of this particular prohibition.[33] The facts relating to violations

[32] In *United States* v. *Balaban* (Crim. No. 31230, D. C. N. D. Ill.), a contempt proceeding was begun in November 1938 for violation of a decree entered against the major distributors and a large theatre circuit affiliated with one of them. The case was referred to a master for the taking of evidence. His report was filed in May 1940. Before any hearing on exceptions to the report, the matter was settled as part of the consent decree entered in *United States* v. *Paramount Pictures, Inc.* (see *supra*, p. 6) and resulted in entry of judgment in December 1940 against three of the eight defendants imposing fines totaling $10,000.

In *United States* v. *Goldman*, 277 U. S. 229, a contempt proceeding was filed in November 1925 alleging violations of a judgment entered in a Sherman Act case. The taking of testimony before a special examiner continued until September 1927. Later the district court dismissed the action on the ground that it was barred by the statute of limitations and this Court reversed. The case ended in November 1928 by finding one defendant guilty and imposing a $2,000 fine.

[33] The ineffectiveness to which we refer is in addition to the ineffectiveness resulting from the narrowness of the substantive prohibition, which has already been discussed (*supra*, pp. 36–7).

are not likely ever to come to the attention of the Government since an independent who has sold his theatre to a defendant exhibitor will not be disposed to register a complaint and thereby, in effect, repudiate the sale which he has agreed to make. And as far as the defendants are concerned, the possibility of a fine for contempt is not an effective deterrent. Such possibility operates as a real deterrent only as against defendants conscious of violation of the judgment. But the ambiguities of the prohibitions of paragraph 19 are such (*supra*, pp. 36–7), and conduct within its scope is susceptible of such varied interpretations, that it is doubtful that the defendants would ever view their conduct as within the bar of that paragraph.

The fact that the relief sought by the Government might somewhat restrict the independents' sales market and thus prevent them from obtaining the maximum selling price is not a valid objection. Any judgment in a Sherman Act proceeding which curbs a defendant's business activities may incidentally prevent third persons from making advantageous deals with him. The propriety of any particular relief is not to be judged solely with respect to the interests of those engaged in the trade or commerce affected by the judgment. Protection of the general consuming public against the evils associated with monopolization of trade, such as high prices and limitation of product, is a primary objective of the Sherman Act, and the

statute must be applied in the light of this objective.[34]

The Government's proposal, which would require the district court to pass upon the validity of all theatre acquisitions prior to their consummation, does not impose any novel or undue burden upon the court. Similar requirements are found in a number of decrees entered in proceedings under the Sherman Act. A decree, entered by consent in 1916 prohibiting acquisition, without prior court approval, of the business or plant of a competitor, was before this Court in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137. Two other similar Sherman Act consent decrees are described below.[35]

Under judgments entered in litigated cases brought under the Sherman Act, courts have fre-

[34] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50, 58; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 42–43; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 500–501.

Monopolization of exhibition threatens consumers (motion picture patrons) not only with high and controlled admission charges but also with restriction in choice of product (entertainment). Irrespective of whether local management is likely to provide entertainment better suited to the needs and desires of the local community than chain operation of motion picture theatres, the consuming public is injured when, through destruction of competition, it is denied opportunity to select between competitive offerings.

[35] In *United States* v. *Schine Chain Theatres, Inc.*, 31 F. Supp. 270 (W. D. N. Y.), the court refused, as a matter of discretion, to grant a preliminary injunction restraining theatre acquisitions, but it later entered an order with the consent of the parties prohibiting the defendant theatre

quently assumed heavy judicial burdens. The judgment entered on the mandate of this Court in *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, provided that any controversy arising between any railroad applying for joint ownership or use of the terminal properties and the proprietary companies should be submitted to the district court for determination.[36] In numerous judgments requiring dissolution courts have assumed the burden of passing upon exceedingly complex plans of dissolution.[37] The judgment entered in *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N. D. Ohio), appeals pending, Nos. 2–11, this Term, requires the district court to exercise extensive supervision over carrying out

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chain, during a two-year period that trial was postponed, from acquiring any new theatre unless the court first approved the acquisition.

A consent decree entered in March 1944 in *United States* v. *Solvay Process Co.* (D. Kans., Civil Action No. 2046) prohibits the defendants from acquiring facilities for the manufacture of soda ash in the State of Kansas unless they show to the satisfaction of the court that the acquisition will not unreasonably restrain or prevent any competitor or potential competitor from producing soda ash.

[36] *Decrees and Judgments in Federal Antitrust Cases*, 98–99. The judgment in this case also came before this Court in *Ex parte United States*, 226 U. S. 420, and in *United States* v. *Terminal Railroad Assn.*, 236 U. S. 194.

[37] See judgments in *United States* v. *American Tobacco Co.*, 221 U. S. 106, *Decrees and Judgments in Federal Antitrust Cases*, 165–191; in *United States* v. *Du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. D. Del.), *Decrees and Judgments in Federal Antitrust Cases*, 193–205; in *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.), judgment (not reported) entered May 8, 1944.

the judgment and also over the acts of the receiver appointed to conduct Hartford-Empire's business during the pendency of any appeal and until the court should be satisfied that there was due compliance with its judgment.

The fact that the district court, moved in part at least by considerations of mere judicial convenience (R. 94–96), finally declined to afford a remedy co-extensive with its original conclusion as to the scope of the injunction to which the United States was entitled, should not, we submit, be regarded by this Court as persuasive. In Sherman Act cases in which this Court has approved the conclusions of the district court as to the nature and character of the defendant's violation of the statute, this Court has not hesitated to review and modify the remedy to be granted. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78–82; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. Cf. *Continental Insurance Co.* v. *United States*, 259 U. S. 156; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728.

III

THE DISTRICT COURT PROPERLY REQUIRED SEPARATION IN OWNERSHIP AND CONTROL OF THE DEFENDANT EXHIBITORS

The judgment (par. 13) requires each defendant exhibitor to divest itself of any interest in any such other defendant or "affiliated" corporation and prohibits acquisition of an interest in any such

defendant or corporation (R. 1483).[38] Sudekum and Stengel are each prohibited (pars. 15, 16) from controlling or acting as an officer of more than one defendant exhibitor or affiliated corporation (*ibid.*). One year from the entry of the decree is allowed (par. 18) for conforming to these requirements (R. 1484).

In considering the justification for these provisions it should be borne in mind that it is undisputed that all the defendant exhibitors are controlled by Sudekum and his family and that Sudekum dictates the general policies which these corporations pursue (*supra*, pp. 11–12). It is likewise undisputed that these corporations have combined with each other in various ways to suppress competition. They have agreed upon a division of operating territory and have combined with each other and with certain distributors in licensing films and making franchise contracts for the purpose of maintaining their theatre monopolies and preventing competition (Conclusions 10, 11, 13; R. 1476–7). By franchise contracts jointly negotiated on behalf of several of them they have obtained important privileges and advantages over competitors covering periods of more than one season.[39]

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[38] Strand Enterprises, Inc., is excepted from the defendant exhibitors to which this prohibition applies (par. 13) and certain named corporations are excluded from the words "affiliated corporations" (par. 17).

[39] Fngs. 115–133, R. 1430–1457. See also note 18, *supra*, p. 17.

As long as the defendant exhibitors continue under common control they will be so managed as to avoid competition with each other. Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 328. In addition, there will be both opportunity and tendency for these exhibitors to support each other in their dealings with distributors in obtaining unfair and unwarranted advantages over independents. The general prohibitions of the judgment against combination and agreement, enforceable only by proceedings having the character of original proceedings for violation of the Sherman Act (*supra*, pp. 38–39), will be of little effect unless the judgment also prohibits the affiliation and common control which induce joint action and agreement. Such prohibition is plainly justified under the principle that the United States is entitled to relief reasonably adapted to prevent continuation of the defendants' former violations of the statute.

This Court in Sherman Act cases has frequently required divestiture, usually together with injunctive relief against particular practices.[40] Concerning reasons for applying the remedy of divestiture, Judge Learned Hand said in *United*

[40] *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

States v. *Corn Products Refining Co.*, 234 Fed. 964, 1018 (S. D. N. Y.):

> In all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone. The difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendants shall have actually discontinued, all make against such a limitation. * * * Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity.

The defendants attack the divestiture provisions of the judgment upon a number of grounds. One contention (Br. 116) is that the required sale of stock of controlled companies will subject them to heavy federal income taxes. But an otherwise appropriate remedy against future illegal conduct is not barred on this account. The fact that defendants' illegal monopolization and restraint of trade have proved extraordinarily profitable confers upon them no immunity from the application of general provisions of law, whether of the antitrust laws or of the tax laws.

Defendants cite (Br. 117–118) two decisions[41] holding that under the facts presented dissolu-

[41] *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N. D. Ohio); *United States* v. *American Can Co.*, 234 Fed. 1019 (D. Md.). Cf. *United States* v. *Sugar Institute, Inc.*, 15 F. Supp. 817 (S. D. N. Y.), dissolution of a trade association not required.

tion of the defendant corporation, which had violated the Sherman Act, was not requisite relief. The need for the remedy of divestiture depends upon the particular circumstances involved and defendants show no parallelism between those in the instant case and those in the cited decisions. Defendants' reference (Br. 122–123) to the fact that divestiture was not required by the consent decree entered in the *Paramount* case is even less pertinent. A consent decree is the product of agreement between the parties. By this particular decree the Government obtained, without trial of the issues, extensive relief against various acts and practices. In return, the Government in effect agreed to forego, for a limited period of time, the divestiture which it believed that a trial of the issues would show to be required.[42]

The defendants contend (Br. 114–115) that divestiture was improper at least as to those of the affiliated corporations which were not shown by the evidence to be very deeply implicated in the practices found illegal by the district court. This argument ignores the fact that Sudekum's control over all of the affiliated corporations was undisputed, that the findings and evidence abundantly show use of the power given by this control to restrain and eliminate competition, and that the corporations particularly referred to (Cumberland and Lyric) were formed (R. 1363) as an

[42] The Government, as previously stated (n. 29, *supra*, p. 35), is currently demanding such divestiture.

incident to elimination of competition. The power given by control having been abused and the opportunity for future like abuse being the same as to all controlled corporations, it was appropriate and necessary to sever the ownership and control of all.

The defendants urge (Br. 117) that the distributors' resources exceed those of the defendant exhibitors and that the exhibitors' bargaining power will be weakened if, as a consequence of divestiture, each exhibitor can bring to the bargaining table only his own limited resources. The implied conclusion is that this result is inequitable and not in the public interest. The argument fallaciously assumes that the business relationships between the defendant exhibitors and the distributors are alone to be considered. But what is of primary public interest is that independents be protected against restraints imposed by the defendant exhibitors acting in combination. From this standpoint the judgment, so far from being inequitable, will leave each defendant exhibitor with far greater resources than any competitor and it will also be left with a substantial territorial monopoly.

The defendants (Br. 123–124) state that persons not parties to the cause own a half interest in various affiliated corporations and may be adversely affected if the defendant exhibitor is required to dispose of his half interest, and defend-

ants contend that what may be termed the minority stockholders are therefore indispensable parties. This objection to the divestiture provisions of the decree was not raised in the district court although there was ample opportunity to do so,[43] and there may therefore be some question whether the objection is open to consideration now. However that may be, we submit that the objection is wholly without merit. The judgment does not operate upon the stock owned by any non-defendant. No legal right of his is infringed by reason of the fact that some other stockholder of the corporation is required to dispose of his stock. *Morgan* v. *Struthers*, 131 U. S. 246. The minority stockholders of the affiliated corporations were no more necessary parties than are the stockholders of any corporation against which a judg-

[43] As to opportunity to make the objection, the following is pertinent: The court's conclusions of law, filed more than two months before judgment, set forth that the plaintiff was entitled to a decree requiring each defendant exhibitor to divest itself of any interest in any defendant or affiliated corporation (R. 1479). The proposed judgment which the plaintiff submitted to the court and to the defendants approximately a month before the judgment contained a paragraph in the same language as that of paragraph 13 of the judgment, the paragraph requiring divestiture (R. 24–25, 26, 1483).

As to failure to raise below the issue of absence of necessary parties, it should be noted that in the hearing on the proposed judgment the defendants' argument was merely that minority stockholders might be injured by divestiture, not that they were indispensable parties if this relief were to be granted (R. 70, 72, 75).

ment is entered in a Sherman Act proceeding, which judgment adversely affects the value of their stock. In *United States* v. *American Tobacco Co.*, 221 U. S. 106, there were substantial minority interests in the corporations which had been brought under common control pursuant to a conspiracy to restrain and monopolize interstate commerce. See 221 U. S. 106, note 1 at pp. 144–148. These minority stockholders were not parties to the action, but it was held (pp. 187–188) that dissolution should be decreed by compelling a separation of the corporations brought under common control.

The only authority cited by the defendants is *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199. In that case Minnesota brought an original action in this Court alleging that the acquisition by Northern Securities of a majority of the stock of two competing railroads brought about a consolidation of these railroads in violation of the laws of Minnesota. The relief sought was that Northern Securities be enjoined from voting the stock of these railroads. Since this relief would have trespassed upon the railroads' right to have their directors elected by the vote of all stockholders, the railroads might well be deemed indispensable parties. Furthermore, the strictness of the rule there laid down may well have been motivated in part by the fact that complete relief could not in any event be secured in this Court,

since one of the railroads was a Minnesota corporation and could not have intervened without ousting this Court's jurisdiction. The decision, we submit, must be confined to its particular facts. In any event *Northern Securities Co.* v. *United States*, 193 U. S. 197, involving the same transaction, conclusively establishes that Corporation A may be required to divest itself of the stock which it owns in Corporation B although minority stockholders of Corporation B are not parties to the cause."[*]

IV

THE PROVISIONS OF THE JUDGMENT RELATING TO THE MAKING OF FRANCHISE CONTRACTS ARE APPROPRIATE AND NECESSARY

The district court concluded that the franchise contracts made by certain defendant exhibitors with Fox, Paramount, and Warner had had the purpose and effect of maintaining the exhibitors' theatre monopolies and preventing others from competing with them (R. 1476). The court accordingly prohibited, by paragraph 1 of the judgment, any future like use of this means of restraining and monopolizing trade (R. 1480). This paragraph, which the defendants have assigned as error, enjoins six of the defendant ex-

[*] The judgment in effect required Northern Securities to dispose of its stockholdings in two railroads and only a few of the other stockholders of these railroads were parties to the action.

hibitors from continuing in combination with each other and with Fox, Paramount, or Warner in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them, and from entering into any similar combinations having similar purposes. The defendants contend that the court should have specified the provisions of the franchise contracts which it considered illegal and should have confined its prohibition to such provisions.

Since the franchise contracts were one of the means by which the defendants carried into effect their general scheme to eliminate competition and monopolize exhibition, the court correctly couched its prohibition in terms of purpose and effect. This form of prohibition has the further justification that it recognizes that, just as a franchise contract is entered into as a whole, so its legality is to be determined by considering the total effect of all of its provisions and not by considering each separate provision as if it stood in isolation. We think that the court's treatment of franchise contracts is more open to criticism upon the score of undue leniency than upon the score of undue severity.

A contract to give to one exhibitor the right to first-run exhibition of all of a distributor's feature pictures is one for exclusive supply. When several distributors make such contracts with the

exhibitor, the groundwork for monopolization of exhibition is laid. When, as in this case, the contracts run for periods of several years and give this exclusive supply to affiliated corporations themselves operating theatre chains, the restraint on competition is clearly unreasonable and illegal. All competition in the licensing of the distributor's features is eliminated in every city in which the chains operate. This is so because, unless there be a parallel competing chain, no competitor in any city involved can make an equivalent offer, i. e., one with the same approximate territorial coverage.

The defendants' franchise contracts had not only these but other elements of undue restraint.[45] They granted the exhibitor an option to give a repeat showing of any picture. The effect of this was practically to bar competitors from even second-run exhibition of the distributor's pictures.[46] The contracts, being made not for one season but for several, froze the competitive situation for their duration. Any new competitor who

[45] See *supra*, pp. 17–18; R. 1430–57.

[46] The most popular pictures would be the ones selected for repeat showing and in small towns two showings would exhaust a picture's drawing power. As to other pictures, the time given the exhibitor for exercise of his option would postpone availability for second-run exhibition, always an important factor. The district court found that the Paramount franchise involved "the complete elimination of any second as well as first-run competition" in the towns covered by the franchise (R. 1438).

might arise was precluded from any opportunity to bargain for first-run showings or for modification of the contract's clearance provisions respecting second-run showings. The restraining effect of such contracts upon potential competition is obvious.

In addition to the foregoing, the defendant exhibitors jointly negotiated their franchise contracts, and the contracts covered the chain operations not of one corporation but of several. They thus were the product of the use, in combination, of the circuit buying power of the several participants.

The defendants object to paragraph 1 upon the ground that it does not furnish them with an "ascertainable standard of conduct." In view of the elements of illegal restraint inherent in the defendants' franchise contracts and the use which the defendants made of them to restrain trade, their outright prohibition would have been warranted. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254. The fact that the court imposed a less clearly defined but more limited prohibition gives the defendants no ground for complaint. Upon a proper showing of need for determining the scope of the prohibition, the court can be called upon to construe its judgment."[17]

[17] Paragraph 20 authorizes any party to apply to the court at any time for such order or decree as may be necessary or appropriate for the "construction" of the decree (R. 1484).

V

THE PROVISIONS OF THE JUDGMENT PREVENTING USE OF CIRCUIT BUYING POWER TO RESTRAIN COMPETITION ARE APPROPRIATE AND NECESSARY

The defendants have assigned error to paragraphs 8 and 12 of the judgment. The former enjoins each of five defendant exhibitors from combining, in licensing films, its closed towns with its competitive situations for the purpose and with the effect of compelling the major distributors to license films on a noncompetitive basis in competitive situations and to discriminate against the exhibitors' competitors (R. 1482). The latter enjoins each defendant exhibitor from conditioning the licensing of films in a competitive situation upon the licensing of films in any other theatre situation (R. 1482–3). Both paragraphs are designed to prevent use of circuit buying power to restrain competition.

If A and B operate theatres in a certain town and A also operates theatres in closed towns, i. e., where he has no competition, and if A can threaten not to license a distributor's pictures in his closed towns unless he receives the distributor's pictures for first-run showing in the town in which A and B both operate and irrespective of whether B makes an equal or better offer, such tactics, provided the distributor yields to A's pressure, completely eliminate all competition between A and B for first-run exhibition of the distributor's films.

Similar threats and pressure may exclude B from even second-run exhibition or result in clearance provisions so burdensome to B as to render his competition ineffective. Such use of a local monopoly of exhibition to obtain agreement by a distributor to impose restraints upon the exhibitor's competitors is a restraint of trade prohibited by the Sherman Act. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227, 229–230.

The defendants do not deny that such use of circuit buying power may eliminate competition. They seem to argue that notwithstanding this fact the prohibitions of the judgment should be set aside because the results produced will be inequitable and not in the public interest.

As the basis of the claim of inequity, the defendants assert (Br. 97–98) that under the judgment a defendant exhibitor will be barred, when negotiating with a distributor, from using the leverage of its closed towns to obtain advantages in its competitive towns, whereas the distributors will not be barred from using the leverage of the exhibitor's competitive towns in obtaining terms favorable to the distributor in the exhibitor's closed towns.* Defendants thus suggest that a distributor could, with impunity, refuse to deal

* As to the distributors' suggested use of leverage, it should be noted that, since only a very small proportion of the defendants' theatres are in competitive towns (*supra*, p. 12), there would be little actual leverage for a distributor to use against a defendant exhibitor.

with them except upon terms which would violate the judgment. Even if this situation could arise, this would not show error. A judgment against defendants who have violated the Sherman Act prohibiting them from illegally restraining trade is not rendered invalid by reason of the fact that the judgment does not prohibit some other persons from engaging in illegal restraints injurious to the defendants. Furthermore, any single distributor attempting to use leverage would subject himself to the risk of losing the exhibitor's business.[49] If several distributors agreed among themselves to make a common demand, this would clearly violate the Sherman Act and render them liable to prosecution and to triple damage suits. *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208.

The defendants also argue (Br. 104–105) that competition between exhibitors is not in the public interest and that they should therefore not be prohibited from using circuit buying power to restrain competition. They assert that an exhibitor who has a local monopoly can drive a better bargain with distributors than can an exhibitor facing competition, and that the former, paying less for his pictures, will pass on the sav-

[49] The defendant exhibitors can procure films adequate to their needs without having those of any particular major distributor; they have several times in the past declined to license the films of a major distributor for an entire season (R. 1379, 1389, 1431, 1451).

ing to the general public in the form of lower admission charges.

Even if this were the effect of the judgment, it would be irrelevant. The courts must apply the policy laid down by Congress without assuming to judge whether in any particular instance the results produced are good or bad. As to the policy laid down in the Sherman Act, there is no doubt. It is that "competition not combination, should be the law of trade." *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465. The Act is "based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397.

The defendants' argument must also be rejected because it involves the false assumption that an exhibitor in a closed town will pass on to the public any saving in the cost of his pictures. If lack of competition enables him to buy cheaper, it much more conclusively enables him to sell higher, that is, to collect higher admission charges from the public. The exhibitor's lower costs because of absence of competition simply go to increase his profits.[30]

The defendants contend that paragraphs 8 and 12 of the judgment affect the rights of the

[30] Cf. the extraordinary profits which the defendant exhibitors, operating very largely in closed towns, have earned (*supra*, pp. 13–14).

major distributors and that they are therefore necessary parties. The defendants, however, do not show in what way the rights of the distributors are affected. Indeed, defendants vigorously assert, as we have already stated (*supra*, p. 48), that these paragraphs confer upon the distributors an inequitable advantage in their dealings with the defendants.

The need for relief of the kind given by paragraphs 8 and 12 is recognized in the consent decree entered against five major distributors in the *Paramount* case. The decree provides (Section X, pars. A, B; R. 207–9) for arbitration of any complaint by an independent exhibitor that a distributor has refused to license to him features on a specific "run" because of having granted such run to a competing circuit. It provides (Section X, par. D; R. 210) that if the complaint is found to be justified the award shall permit the distributor to license such run only by a contract not a part of any contract—

> for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.[51]

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[51] In an application to modify the above decree filed August 7, 1944, the Government has requested the elimination of Section X and has proposed a provision reading: "No decree defendant shall condition the licensing of films in one theatre or a group of theatres upon the licensing of films in another theatre or group of theatres."

VI

THERE IS NO FAILURE OF PROOF AS TO ANY ESSENTIAL ALLEGATION OF THE COMPLAINT

The defendants contend (Br. 21–43) that the Government failed to prove the allegations of the complaint as amplified by the bills of particulars. There is no such assignment of error and we do not believe that the issue raised is open for consideration. We shall nevertheless consider it on its merits.

Since the present contention rests, as we later point out (*infra*, pp. 63–67), on an interpretation of the complaint which ignores most of its essential allegations, we shall first briefly review these allegations and state the manner in which they were established.

The complaint, after naming the defendants, defining certain terms used, and describing the business involved (R. 1–7), sets forth the charge of illegal conduct in paragraphs 45–55 under the heading "Violations Alleged" (R. 7–10). Paragraph 45 charges violation of Sections 1 and 2 of the Sherman Act in general terms and paragraphs 46–49, 54 and 55 then amplify this charge.[52]

Paragraph 46 alleges that the defendant exhibitors refrained from competing with each other pursuant to agreements to allocate their respec-

[52] Paragraphs 50–53 were eliminated from the complaint by a later amendment (R. 19).

tive areas of theatre operation. The district court so concluded (R. 1476–7) and enjoined such agreement (R. 1480–1). Neither this conclusion nor this injunctive provision has been assigned as error.

Paragraph 47 alleges that the defendant exhibitors have collectively contracted with each major distributor for all feature pictures required for exhibition at all theatres operated by them. Paragraph 48 alleges that by these contracts the exhibitors have combined with each other to compel each major distributor to grant to all of them in all of the towns in which they operate the exclusive privilege (a) of selecting such of the distributor's feature pictures as they may desire and (b) of receiving clearance over competitors on these pictures.

The court's findings as to the franchise contracts with Fox, Paramount, and Warner, which have already been discussed (*supra*, pp. 17–18, 52–54), in themselves establish the practices alleged in paragraphs 47 and 48. Many other instances and details of joint action taken by defendant exhibitors to procure film licenses and privileges from the distributors are shown by findings 32, 33, 34, 36 and 37 (R. 1368–1372). No error has been assigned to these findings or to any material part of the findings relating to franchise contracts. Defendants' brief does not attempt to show failure of proof as to them.

Paragraph 49 alleges that the exclusive priv-

ileges described in paragraph 48 have enabled the defendant exhibitors unreasonably to restrain, suppress, and eliminate the competition of other theatre operators in Crescent towns by (a) preventing them from obtaining enough first-class pictures for successful operation, (b) forcing them to exhibit feature pictures previously exhibited or rejected by the defendant exhibitors, (c) preventing them from showing feature pictures of major distributors with first-run clearance, and (d) preventing them from exhibiting such pictures with second-run clearance in any town where a defendant exhibitor operates a second-run theatre. Paragraph 54 alleges that by reason of the defendant exhibitors' control of the most desirable motion pictures they have been able practically to eliminate competition in Crescent towns; that sale of independent theatres to them has been induced by the threat of opening competing theatres and preventing the independent from procuring desirable pictures; and that by such tactics a large number of independents have been forced out of the motion-picture business.

Findings 38–110 (R. 1372–1428) abundantly establish the allegations of paragraphs 49 and 54 even if no consideration is given to those parts of the findings to which error is assigned. Moreover, such parts have adequate support in the evidence (Appendix, *infra*, pp. 74–77).

Paragraph 55 alleges that use of circuit buying

power, in the manner previously alleged, constitutes in itself a violation of the Sherman Act. This presents a legal rather than a factual question.

We have shown that there is no failure of proof as to the essential allegations of the complaint. The defendants arrive at the contrary conclusion by a tortuous path. First, they erroneously conclude that the only proof and findings which will support the complaint are those which (1) relate to a competitor who was actually put out of business and (2) were set forth in the Government's bills of particulars. Using these tests, they find only nine "situations" within them. They then discuss these situations, not from the standpoint of the evidence in support of the findings which the court made, but from the standpoint of (1) the number of distributors whose pictures were or might have been available to the competitors eliminated and (2) whether the court made any finding repeating verbatim the language of the bill of particulars relating to the competitor in question.

We submit that the erroneous assumptions and conclusions in the argument advanced are many and fundamental.

(1) The argument completely ignores all findings and proof as to franchise contracts. These alone are sufficient to support the Government's complaint.

(2) The argument erroneously assumes (Br.

26–27) that only proof and findings as to competitors who have been eliminated support the complaint. The violation of Section 1 of the Act alleged in paragraph 45 is that the defendant exhibitors combined unreasonably to "restrain" interstate commerce. Paragraph 49 alleges that the exclusive privileges obtained by the defendant exhibitors from distributors have enabled them unreasonably to "restrain, suppress, and eliminate" the competition of independents. These allegations of combination to "restrain" trade and competition embrace restraints which do not go to the point of complete elimination of competitors. It hardly need be added that the restraints prohibited by the Sherman Act are not confined to those which render it impossible for a competitor to survive.

(3) The argument erroneously assumes (Br. 22–23, 26–27) that only proof and findings which were set forth in the bills of particulars furnished in response to the defendant exhibitors' motion support the complaint. Of the paragraphs charging illegal combination and monopolization (45–49, 54, and 55), defendant exhibitors' motion was granted (except in minor, immaterial respects) only as to paragraph 49 (R. 143–7, 152).[53] Accordingly, even if the bills of particulars had the effect of limiting proof to the particulars fur-

[53] The motion was also granted as to paragraph 43, which alleges certain consequences of the illegal conduct thereafter charged. The allegation in paragraph 43, in so

nished, this limitation applies only to paragraph 49 and a failure of proof as to it would show no general failure of proof. However, the bills of particulars do not have the limiting effect ascribed to them. The function of such a bill, as the court ruled in granting in part the motions for bills of particulars, is not to furnish information on evidentiary matters but to enable the defendants to prepare responsive pleadings (R. 149). To receive evidence not particularized in the bills was the equivalent of permitting an amendment of the pleadings. Since no objection was made to the admission of evidence on the ground that it was not within the pleadings, no objection, following trial, can be made on this ground.[54]

(4) As to the nine situations which defendants discuss, the argument is erroneously made (Br.

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far as it is an essential one, is covered by the allegations of paragraph 49.

Certain parts of the defendant exhibitors' motion were denied for the reason that the court was granting practically the same requests on motion of five of the defendant distributors (R. 148–9, 152). The bills of particulars furnished in response to the court's order on the latter motion were not included in the record on appeal.

[54] Rule 15 (b) of the Rules of Civil Procedure provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The only objection to evidence on the ground that it was outside the pleadings was as to evidence involving transactions occurring after the filing of the complaint. This objection was met by filing a supplement to the complaint (R. 20).

29–38) that proof of restraint of trade is lacking if it appears from the findings that the pictures of several distributors were or might have been available to the independent. The question of the number of distributors whose pictures were withheld from competitors by defendants' combination simply goes to the extent of the injury inflicted. If the defendants combined for the purpose of injuring or destroying independents by depriving them of fair competitive opportunity, effectuation of the conspiracy by barring them from the pictures of even one distributor need not be shown; what the statute condemns is the illegal combination or conspiracy.[55] In fact, the proof in the present case showed very substantial effectuation of the conspiracy—the defendant exhibitors, through the exercise of circuit buying power, obtained important exclusive privileges and preferences from leading major distributors.[56] Defendants rely (Br. 22, 29) upon the allegation in paragraphs 40–42 that theatres in Crescent towns require for

[55] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, note 59 at pp. 224–225.

[56] While there are eight major distributors, defendants themselves point out (Br. 4) that Columbia, Universal and United Artists refer to themselves as the "Little Three" and to the others as the "Big Five". It is significant that for the most part the pictures which the defendants' brief indicates as being available to competitors were those of the Little Three. Where an exhibitor had been showing in his theatre principally pictures of two or three of the leading distributors, loss of the pictures of even one of them might spell the difference between success and failure.

their successful operation a substantial number of the feature pictures of three or more of the major distributors. This does not qualify the subsequent allegations of illegal restraint so as to confine them to instances in which competitors are unable to obtain the feature pictures of at least six of the eight major distributors.

(5) As to the nine situations discussed, the defendants erroneously argue (Br. 30–38), at least by implication, that findings are to be ignored unless they include the exact language of the bill of particulars.[57] Obviously the utmost that might be required is that it appear from the findings as a whole that there existed the kind of situation described in the particulars.

VII

THE DEFENDANTS' GENERAL OBJECTIONS TO THE COURT'S FINDINGS ARE UNFOUNDED AND IMMATERIAL

A. FINDINGS BASED UPON ALLEGED INCOMPETENT EVIDENCE

Defendants assign error to all findings and parts of findings predicated upon "unsworn statements", written or oral, made by employees of distributors (R. 1515). There is no further specification of the findings or parts of findings so predicated except for seven illustrations given

[57] As to each of the nine situations defendants make a statement similar to the following (Br. 32): "There is no Finding that Dozier 'had trouble procuring pictures and was forced to sell,' as alleged in the bill of particulars".

in defendants' brief (pp. 69, 73, 74–5, 76, 88, 91, 138–40).

The evidence to which defendants object consists of letters or reports written in the regular course of their duties by certain employees of the major distributors to other employees or officers of the same company revealing reasons for its discrimination against an independent theatre in favor of a Sudekum theatre. The distributor's relations with the theatres involved, what the distributor actually did, and the character and extent of the defendants' circuit buying power were otherwise proved. The other evidence thus fully established the actual discrimination and warranted the inference that the discrimination was induced by defendant exhibitors for the purpose of restraining competition. Accordingly, since the inter-office communications represented merely supplementary proof on the latter point, no ground for setting aside any material finding of the court would be shown even if the statements in the communications were deemed incompetent evidence.

The basis for the general common-law rule against admission of hearsay evidence is that the party against whom it is offered is denied opportunity to cross-examine as to the truth of the statements made. Wigmore, *Evidence* (3d ed.), Sec. 1362. The defendants were not denied this opportunity with reference to the inter-office com-

munications received in evidence. Most of the writers testified in the case.[58] As to communications written by persons not called as witnesses, the reason for their not being called was that the defendants voluntarily stipulated that the writer, if called to the stand, would testify that he had written the communication in question pursuant to his official duties and that the letter had been received by the addressee.[59] It follows, therefore, that defendants' objection to the competency of the evidence is purely technical. The defendants did not avail themselves of the opportunity to question the authors of the inter-office communications, who were friendly to the defendants in this litigation,[60] as to the truth of the statements made in their communications (see Def. Br. 69, 76).

Aside from these considerations, the inter-office communications were clearly competent evidence against the defendants under "the principle that

[58] In five of the seven illustrations referred to in defendants' brief, the writers of the communications testified (Br. 69, 76, 88, 91, 138–40).

[59] See R. 723–4, 725, 726, 727, 728, 729–30.

[60] The writers were employees of the major distributors, all of whom were originally named defendants. Five were dismissed as defendants in connection with the entry of a consent decree against them in another Sherman Act proceeding brought by the Government. Two of the other three remained defendants throughout the trial. Columbia was dismissed as a defendant by order of the court at the close of the Government's case.

when any number of persons associate themselves together in the prosecution of a common plan or enterprise, * * * the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

The distributors were all charged with having combined with the defendant exhibitors to restrain and monopolize interstate commerce (R. 7) and this charge was not withdrawn when the Government dismissed five distributors as defendants and eliminated the charge, made in paragraphs 50–53 of the complaint, that the distributors had combined with each other, as well as with the defendant exhibitors, to restrain and monopolize interstate commerce. Not only were the distributors charged with being co-conspirators with the defendant exhibitors but, as the court's findings show, the evidence fully supported this charge except as to Columbia and Universal. The distributors' declarations were therefore admissible against the defendant exhibitors and this is equally so as to the declarations of distributors who were dismissed as defendants. *Delaney* v. *United States*, 263 U. S. 586, 590. And the declarations of an officer or employee of a distributor, acting on behalf of his corporate principal and within the scope of his authority, are the declarations of the distributor for whom he acts. *Xenia*

Bank v. *Stewart*, 114 U. S. 224, 228–229; *Riverside Fibre & Paper Co.* v. *O. C. Keckley Co.*, 32 F. (2d) 23, 26 (C. C. A. 7).

B. FINDINGS CORRESPONDING TO THE LANGUAGE OF THE GOVERNMENT'S BRIEF

The defendants have assigned error to all findings and parts of findings "adopted from" the Government's brief and to the conclusions based upon such findings (R. 1514–5). The parties have stipulated that, with some exceptions, findings 11–67, 70–81, 83–98, 100–110, and 114–133 "correspond with language" in the Government's brief in the district court, except that at intervals sentences or paragraphs in the applicable parts of the brief are omitted from the findings (R. 1522).

Defendants contend (Br. 77–80), not that the above facts render the findings invalid, but that they rob the findings of "a presumption of correctness." While it might have been better judicial practice to limit findings more nearly to findings of ultimate fact than was done in this case, we believe that full consideration of the district court's action will show that its findings are entitled to the usual presumption of correctness.

If findings are made in the detail here undertaken it is natural and appropriate for the court to employ, as an aid in formulating the findings,

the briefs and other papers submitted to it by the parties. In the present case the inference is strong that the court carefully checked and weighed those statements in the Government's brief which it incorporated in its findings. As to Universal, for example, the court's findings were contrary to the factual conclusions presented in the Government's brief. In those findings which correspond to the language of the brief, separate paragraphs and sentences appearing in the brief are omitted from the findings. A substantial number of findings are not based upon any language in the Goverment's brief.

The brief which the Government submitted to the district court contained complete record references for the statements made therein. The findings were filed more than 14 months after oral argument of the case following trial (*supra*, p. 6). It is only fair to presume that the court in preparing its findings satisfied itself, from its examination of the record citations in the Government's brief and from its recollection of the impression made by certain witnesses, as to the substantial accuracy of the language of the brief which it incorporated in the findings.

The comparatively minor amendments to the findings requested by the defendants (R. 108–15, 118–38) go far to attest the accuracy of the findings. The court's action on the requested amendments (R. 1489–93) and its general open-

mindedness disclosed at the hearing on the judgment to be entered (R. 27–108) further attest that the court's consideration of this case was painstaking and judicious.

CONCLUSION

It is respectfully submitted that the district court should be directed to modify paragraph 19 of the judgment as requested in the Government's specification of error (*supra*, p. 20), and that the judgment of the district court should otherwise be affirmed.

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SEPTEMBER 1944.

APPENDIX A

THE EVIDENCE IN SUPPORT OF FINDINGS TO WHICH SPECIFIC ERROR HAS BEEN ASSIGNED [1]

Assignment 1.—The statement (Fng. 39) as to Lawing's inability to secure pictures from the major distributors for his theatre at Paris, Tenn., is supported by his direct testimony (R. 302–4). Some qualification of the statement, but no essential modification, is suggested by Lawing's cross-examination and by two other findings of the court, to which defendants refer (Br. 81–82).

Assignment 2.—The statement (Fng. 44) of the reasons for not accepting Connors' explanation of Loew's sell-away of Lawing's theatre at Brownsville, Tenn., is a permissible inference from facts stated in findings 43, 44 (earlier part), and 45 (R. 1374–8), to which no error is assigned.

Assignment 3.—The statement (Fng. 45) that Lawing offered Loew's at Brownsville at least as good as deal as did Crescent is supported by evidence (R. 308). It also represents a comparison of Lawing's and Crescent's offers (Exs. L–9, L–18). Since defendants did not include these exhibits in the record on appeal they are not in a position to attack the finding as unsupported by evidence.

Assignment 4.—This relates to failure to make a supplementary finding. We are not aware of evidence supporting the proposed finding and defendants' brief does not refer to this assignment.

[1] R. 1506–1514.

Assignment 5.—The statements (Fng. 48) concerning Dozier's 1935–6 contract with Paramount are supported by direct evidence (R. 342, 364–5, 375–6).

Assignment 6.—This relates to failure to make a supplementary finding as to the film rentals paid to Warner by Miller in 1936–7 and by Cumberland in 1937–8. The proposed finding would not refute or discredit the court's finding that, for the 1937–8 season Miller's offer was at least as good as Cumberland's.

Assignment 7.—The statement (Fng. 59) that Paramount, after giving an independent theatre clearance over one operated by Rockwood for the 1937–8 season, gave the latter clearance the next season because of Sudekum's pressure is supported by the letter (R. 655) quoted in part in finding 59 (R. 1390).

Assignment 8.—The statement (Fng. 63) that when a Paramount salesman wrote an independent in October 1937 that its pictures were not available to him because of Paramount's deal with Sudekum for his circuit, the salesman was referring to Paramount's franchise contract with the Crescent circuit (dated July 28, 1938, as of November 1, 1937) is a legitimate inference since there was no agreement between Crescent and Paramount for the 1936–7 season.

Assignment 9.—The statement (Fng. 70) that the repeat-run provisions of Paramount's franchise to the Crescent circuit constituted one reason why Paramount advised an independent that its pictures were not available to him second-run is a legitimate inference from the letter quoted in finding 70 (R. 1397).

Assignment 10.—The statement (Fng. 81) that the negotiation and execution of a rider to the Paramount franchise contract relating to Union City, Tenn., showed that Crescent intended to eliminate Henry as a competitor there and that Paramount was willing to cooperate is a legitimate inference from other facts set forth in finding 81 (R. 1403) and those set forth in finding 84 (R. 1410), to which no error has been assigned.

Assignment 11.—The statement (Fng. 100) that Curry did not attempt to negotiate with Paramount because it was well understood that Crescent had a first-run franchise and a second-run option is supported by direct testimony (R. 472). The further statement (Fng. 100) that five major distributors held the independent theatre in Alabama City, Ala., behind the Crescent theatre because of pressure which Sudekum was able to exert on these distributors is an obvious inference from the facts stated in findings 95–99 (R. 1421–4), to which no error has been assigned.

Assignment 12.—The statement (Fng. 118) that Morgan in negotiating Rockwood's franchise from Paramount knew what its effect would be upon competitors in certain cities is a legitimate inference from Morgan's intimate knowledge of the business and his discussion with Sudekum of the franchise's probable effect on relations between Paramount and certain independents (R. 650, 653–6).

Assignment 13.—The statement (Fng. 119) that the repeat-run clause in the Paramount franchise, both as it originally stood and as modified, was completely effective in preventing sale of its fea-

ture pictures second run to Crescent's competitors is supported by the letter quoted in finding 70 (R. 1397).

Assignment 14.—The statements (Fng. 122) as to the Warner franchise and its effect are justified by facts stated in findings 120–121 and other facts stated in finding 122 (R. 1438–1442), to which no error has been assigned.

Assignment 15.—The statements (Fng. 127) with reference to the Fox franchise are supported by the letter quoted in finding 127 (R. 1448–9).

Assignment 16.—The statement (Fng. 133) that an obvious purpose of the Fox, Paramount, and Warner franchises was to provide an ostensibly valid reason for discriminating in favor of the Sudekum circuit is a proper inference from facts, to which no error has been assigned, stated in findings 115–132 (R. 1430–1456).

APPENDIX B

Table of Contents of District Court's Findings of Fact[1]

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W. O. Taylor at Dresden, Tenn	90-91	1418-9.
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Perdue at East Gadsden, Ala	94-100	1420-5.

[1] The headings and subheadings are those of the court except that we have added, for more convenient reference, the subheads in Section A; the last subhead in Section B, all subheads in Section C, and the first and last subheads in Section E.

Where any finding was amended, the record citation includes the amended finding.

Table of Contents of District Court's Findings of Fact—Continued

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